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SECURITIES COMMISSION MALAYSIA v. WONG SHEE KAI & ORS; BRIGHT PACKAGING INDUSTRY BHD (PROPOSED INTERVENER)

HIGH COURT MALAYA, KUALA LUMPUR
ANAND PONNUDURAI JC
B [SUIT NO: WA-22NCC-171-05-2020]
8 MARCH 2021

CIVIL PROCEDURE: *Intervener – Application for – Directors of company used corporate exercises as devices, schemes and/or acts which operated as fraud upon company – Securities Commission commenced action for recovery of monies against directors of company – Application by company to intervene and to be added as co-defendant – Whether company had legal interest – Whether company would be directly affected by judgment and/or order – Whether company had pecuniary interest – Whether application to intervene ought to be allowed – Rules of Court 2012, O. 15 r. 6(2)*

The first and second defendants were the directors and shareholders of the third defendant. The third defendant was a substantial shareholder of Bright Packaging Industry Bhd ('BPI'), making the first and second defendants the indirect shareholders of BPI. Even though the first and second defendants were not the directors of BPI, they were its authorised signatories. The plaintiff's investigations led to the discovery that (i) the defendants had used three corporate exercises as devices, schemes and/or acts which operated as a fraud upon BPI; (ii) substantial payments were channelled through various nominee companies before being eventually transferred into the bank accounts of the first and third defendants; and (iii) the nominee companies were controlled by the defendants and were used as a front where these nominee companies received monies from BPI based on fictitious transactions. The plaintiff filed an action against the defendants, pursuant to ss. 200 and 360 of the Capital Markets and Services Act 2007 ('CMSA'), seeking, *inter alia*, the recovery of monies from the defendants for the purposes of, *inter alia*, compensating persons who suffered losses and damages following the defendants' contravention of s. 179(a) and/or (b) of the CMSA ('main suit'). BPI filed the present application, pursuant to O. 15 r. 6(2)(b) of the Rules of Court 2012 ('ROC'), for leave to intervene and to be added as the fourth defendant and, consequentially, parties should be allowed to amend pleadings ('encl. 107'). The application was supported by an affidavit affirmed by the group corporate advisor of BPI ('Lye') ('encl. 108'). The grounds in support of encl. 107 were that BPI's involvement was necessary as BPI (i) had legal interest in the determination of (a) whether BPI's corporate exercises were to be impugned; and (b) whether the proceeds from the three corporate exercises were

fraudulently misapplied/misappropriated; (ii) would be directly affected if the court impugns its corporate exercises and finds that proceeds of the same were misused; such a finding would undoubtedly affect market confidence in BPI and open BPI to possible sanctions and liabilities; (iii) had pecuniary interest in the relief sought by the plaintiff. Resisting encl. 107, the plaintiff argued that (i) Lye, who was not a director of BPI, lacked credibility and authorisation and was a complicit in the conduct of the defendants as he had signed payments in relation to the corporate exercises; and (ii) there was an inordinate delay by BPI in filing the application.

Held (dismissing encl. 107 with costs):

(1) Having considered BPI's board resolution, authorising Lye, the court accepted encl. 108 as being regular and admissible. It also could not be said that there had been an inordinate delay by BPI as the plaintiff's statement of claim was filed on 29 May 2020 and encl. 107 was filed on 28 August 2020, *ie*, within three months. (paras 25 & 26)

(2) To force the plaintiff to take action against BPI would be inconsistent with the performance of the plaintiff's statutory duties. The plaintiff should not be forced to add BPI as a defendant given that the plaintiff (i) was not seeking any relief or remedy against BPI in the main suit; (ii) did not wish to sue BPI as its investigations did not show that BPI had contravened any provisions or committed an offence under the CMSA; and (iii) should be allowed to proceed against the defendants of its choice based on the evidence obtained from their investigations. (para 36)

(3) The primary dispute in the main suit was whether the defendants had contravened s. 179 of the CMSA. BPI's presence was not necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. There were also no questions or issues arising out of, or relating to or connected with the relief or remedies sought by the plaintiff between BPI and any party to the main suit to be determined by the court. (paras 37, 38 & 41)

(4) BPI failed to satisfy the requirements of O. 15 r. 6(2) of the ROC as it failed to show any direct legal interest in the subject matter of the main suit. It would be in the best interest of BPI to allow the court to examine, at trial, the conduct of the defendants and to make a determination on whether the plaintiff had established its case against the defendants. If BPI, for any reason, were of the view that the defendants had not committed any contraventions of the CMSA, the defendants were fully entitled to produce anybody from BPI to testify on their behalf. There was no necessity for BPI to be made a co-defendant. (para 50)

Case(s) referred to:

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Chew Cheah Yin v. Tan Lee Lee; Real Expansion Sdn Bhd (Intervener) [2020] 1 LNS 1108 HC ***(refd)***

Chong Fook Sin v. Amanah Raya Bhd & Ors [2010] 7 CLJ 917 FC ***(refd)***

Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor Malaysia Bhd & Ors And Another Appeal [2008] 3 CLJ 323 CA ***(refd)***

Kumarasamy Pillai Govindaraju & Ors v. Vijayasundaram Sambantham Mudaliar & Anor; Vegadachalam Palaniappen (Intervener) [2009] 1 LNS 1722 HC ***(refd)***

Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor [2003] 2 CLJ 505 CA ***(refd)***

Pegang Mining Company Ltd v. Choong Sam & Ors [1968] 1 LNS 96 PC ***(refd)***

Tajjul Ariffin Mustafa v. Heng Cheng Hong [1993] 3 CLJ 117 SC ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 SC ***(refd)***

Legislation referred to:

Capital Markets and Services Act 2007, ss. 179(a), (b), 200(2), (3)(b), 360
Rules of Court 2012, O. 15 r. 6(2)(b)(i), (ii)
Securities Commission Malaysia Act 1993, ss. 15, 16

For the plaintiff - Lim Chee Wee, Kwan Will Sen & Joyce Lim Hwee Yin; M/s Lim Chee Wee Partnership

For the proposed intervener - David Thomas Mathews & Ng Ken Yong; M/s Mathews Hun Lachimanan

Reported by Najib Tamby

JUDGMENT
(encl. 107)

Anand Ponnudurai JC:

[1] Enclosure 107 is an application by the proposed intervener, Bright Packaging Industry Bhd (hereinafter referred to as "BPI"), for leave to intervene and be added as the fourth defendant ("D4") and that consequentially, parties should be allowed to amend pleadings.

[2] The application was supported by an affidavit affirmed by one Lye Jun Fei (encl. 108) in his capacity as the group corporate advisor of BPI.

[3] The plaintiff resisted the said application and filed an affidavit-in-reply (encl. 118) stating their reasons for objecting to the application. In addition, the plaintiff also challenges the authority as well as the credibility of the said Lye Jun Fei to affirm the affidavit on behalf of BPI.

[4] In response, BPI filed a further affidavit-in-reply (encl. 128) and annexed thereto the board resolution of BPI resolving to apply *inter alia* to intervene and that the said Mr Lye Jun Fei was duly authorised to instruct solicitors and affirm all affidavits.

[5] In addition to their written submissions, I heard counsel for the plaintiff and BPI on 2 February 2021 whereafter I dismissed encl. 107. I now provide my reasons for doing so.

[6] In order to understand the context of BPI's application for leave to intervene, it is best that I set out a brief description of the parties and a summary of the plaintiff's claim in this suit.

The Description Of The Parties

[7] The Securities Commission ("SC") is a regulatory body established under the Securities Commission Malaysia Act 1993 ("SCMA") and is mandated by Parliament to develop and regulate the Malaysian capital market. As a regulator, the SC is involved in the rulemaking, authorisation, supervision and enforcement aspects of the capital markets, playing a crucial role in ensuring a robust framework that continues to facilitate growth for the country's economic prosperity.

[8] The SC has supervisory and enforcement powers pursuant to its statutory functions under s. 15 of the SCMA. As set out in s. 16 of the SCMA, the SC has all such powers as may be necessary for or in connection with, or reasonably incidental to, the performance of its functions under the securities laws.

[9] The first defendant, Ricky Wong Shee Kai ("D1"), is the son of the second defendant, Madam Teh ("D2"). Both D1 and D2 are the only directors and shareholders of the third defendant ("D3"). 03 is a substantial shareholder of BPI. As such, by virtue of D3's shareholding in BPI, D1 and D2 are indirect shareholders of BPI.

[10] At all material times, D1 and D2, as well as others, were authorised signatories of BPI's bank accounts. D1 and D2 were at no point directors of BPI.

[11] It is not disputed that BPI had undertaken three corporate exercises between the years 2013 to 2015 and based on SC's investigations, it was discovered/alleged that the defendants had used the said corporate exercises as devices, schemes and/or acts which operated as a fraud upon BPI. It is alleged and contended that substantial payments were channelled through various nominee companies before being eventually transferred into the bank accounts of D1 and D3.

[12] The SC's investigations revealed that such nominee companies were controlled by the defendants and were used as a front whereby the nominee companies received monies from BPI based on fictitious transactions.

The Summary Of The SC's Claim In The Main Suit

[13] The SC had filed the main suit pursuant to s. 200 and s. 360 of the Capital Markets and Services Act 2007 ("CMSA") in the interest of the public and in the exercise of its statutory functions and powers as a regulator of the capital market to seek for, among others, recovery of monies from the defendants for the purposes of amongst others, compensating persons who have suffered loss and damage as a result of the defendant's contravention of s. 179(a) and/or 179(b) of the CMSA.

[14] It is the SC's claim that the defendants had engaged in prohibited conduct of using devices, schemes or artifices and/or engaging in acts/practices which operated as a fraud upon BPI. In this case, the alleged prohibited conduct involved siphoning proceeds raised· by BPI from the said corporate exercises.

[15] The statement of claim filed by the plaintiff is lengthy and consists of 262 paragraphs setting out and describing in detail the alleged fraudulent acts of the defendants and I see no necessity to set them out herein for the purposes of this judgment.

[16] The plaintiffs pleads that as a result of the defendant's contravention of s. 179(a) or 179(b) of the CMSA, BPI has suffered a loss of RM56,074,500 and alleges that the defendants have received an unlawful pecuniary gain of the same amount from the three corporate exercises.

[17] There is an outstanding warrant of arrest against D1 in respect of criminal proceedings commenced by the SC.

[18] Pursuant to the plaintiff's *ex parte* application, I had, on 8 May 2020, granted a *Mareva* injunction against the defendants from withdrawing or disposing or dealing with any of their assets whether within or outside Malaysia up to the value of RM169,223,500. This amount was derived at after taking to account that the civil action commenced by the SC under s. 200 of the CMSA provided for a claim to recover an amount not exceeding three times the pecuniary gain as well as a civil penalty of RM1 million.

[19] Applications to set aside the said *Mareva* injunction are currently pending.

[20] The trial of the main suit is fixed for 5 to 8 April 2021, 20 to 24 September 2021 and 27 September to 1 October 2021.

Basis Of BPI'S Application To Intervene

[21] BPI's application is made pursuant to O. 15 r. 6(2)(b) of the Rules of Court 2012 ("ROC") and the grounds in support of their application can be summarised as follows:

(i) BPI's involvement is necessary as they have a legal interest in the determination of whether the BPI's corporate exercises are to be impugned;

(ii) BPI has a legal interest in the determination of whether the proceeds from the three corporate exercises were fraudulently misapplied/misappropriated; and

(iii) BPI will be directly affected if the court impugns its corporate exercises and finds that proceeds thereof were misused. It is contended that such a finding would undoubtedly affect market confidence in BPI and open BPI to possible sanctions and liabilities.

[22] BPI contend that they should be allowed to participate to present its position on the above issues and submit that their participation as defendants may be of assistance to the court and will not cause any injustice to any of the parties.

[23] In their affidavit-in-support of the application (encl. 108), BPI have averred that it did not suffer any loss from the alleged illegal and fraudulent acts. In this regard, they further aver that they had, on 12 August 2020, appointed a forensic auditing firm to undertake an independent investigation on the corporate exercises and that such reports would be ready within four to five weeks and would be extended to court. However, no such reports have been filed by BPI as of 2 February 2021.

[24] BPI finally also contend that they ought to be allowed to intervene as they have a pecuniary interest in the relief sought by the SC. In this regard, notwithstanding their contention that they have not made any losses, BPI state that they have a duty to recover the alleged losses in the event the defendants are found liable and this would lead to a multiplicity of proceedings.

Analysis/Decision

[25] At the outset, I will quickly deal with two preliminary issues. The first one deals with the objection of the plaintiff on the alleged lack of credibility and authorisation on the part of Lye Jun Fei to affirm the affidavits-in-support of the application herein. In this regard, the plaintiff contends that the affidavit ought to be inadmissible as the said Lye Jun Fei is not a director of BPI. It is further alleged that the said Lye Jun Fei lacks credibility as he had signed payments in relation to the corporate exercises and complicit in the conduct of the defendants. However, notwithstanding the said allegations, having considered exh. LJF 3 which was BPI's boards resolution authorising Lye Jun Fei, I have decided to accept the said affidavits as being regular and admissible.

[26] On the second issue raised by the plaintiff that there has been an inordinate delay by BPI in filing the application, I find no merits in such contention. Whilst it is trite law that intervention applications should be made at the earliest possible opportunity, it cannot be said that there has been an inordinate delay by BPI as the statement of claim was filed by the plaintiff on 29 May 2020 and the application to intervene filed on 28 August 2020, ie, within three months.

[27] As such, I will now proceed to consider the substantive application and decide if BPI has satisfied the threshold for intervention.

[28] As this application is made pursuant to O. 15 r. 6(2)(b) of the ROC, it is apt to set out the same:

> **6. Misjoinder and non-joinder of parties (O. 15 r. 6)**
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> (1) A cause or matter shall not be defeated by reason of the misjoinder or nonjoinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
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> (2) Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application:
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> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
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> (b) order any of the following persons to be added as a party, namely:
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[29] Hence, the court may order the following persons to be added as a party to the proceedings in the following circumstances:

(i) Rule 6(2)(b)(i) – a person whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined had adjudicated upon; and/or

(ii) Rule 6(2)(b)(ii) – where there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause of matter which in the opinion of the court exists between the proposed intervener and any party to the suit.

[30] The granting of leave to intervene is a discretionary one and the main object of O. 15 r. 6(2) of the ROC is to prevent multiplicity of proceedings and to "contribute to the effective, complete, and global disposal of

determination of the dispute in the cause or matter or of the relief or remedy that is claimed in it" (see the Court of Appeal decision of *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor* [2003] 2 CLJ 505; [2003] 4 MLJ 447).

[31] The principles on intervention are well settled and can be summarised as follows:

(i) in determining whether a party may be added as an intervener, the test to be adopted is whether the proposed intervener's "legal interests", ie, his rights against or liabilities to any party to the action in respect of the subject matter of the action, would be directly affected by any order or judgment which might be made in the action. Commercial interests alone would not be sufficient to allow intervention. This was held in the Supreme Court case of *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344; [1992] 2 MLJ 63 ("*Tohtonku*"), where the landmark Privy Council decision of *Pegang Mining Company Ltd v. Choong Sam & Ors* [1968] 1 LNS 96; [1969] 2 MLJ 52 ("*Pegang Mining*") was cited:

> It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgment in the action but not if his commercial interests alone would be affected: per Lord Diplock in *Pegang Mining Co Ltd v. Choong Sam & Ors* at pp. 55-56. In that case, the Privy Council had formulated the test to determine whether a party's interests in the matter are 'legal' or merely 'commercial' in the following words (at p. 56):
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> > A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in this action?

(ii) for sufficient interest to justify intervention, a direct legal interest must be established. An indirect or commercial interest does not satisfy the requirement (see Federal Court decision of *Chong Fook Sin v. Amanah Raya Bhd & Ors* [2010] 7 CLJ 917; [2011] 1 MLJ 721 ("*Chong Fook Sin*"));

(ii) the burden is on the proposed intervener to satisfy the court that the requirements set out in O. 15 r. 6(2) of the ROC have been met before intervention can be allowed (see: High Court decision of *Kumarasamy Pillai Govindaraju & Ors v. Vijayasundaram Sambantham Mudaliar & Anor; Vegadachalam Palaniappen (Intervener)* [2009] 1 LNS 1722; [2010] 4 MLJ 567).

[32] Further, the power of the court to add a defendant on the application by a proposed defendant generally cannot be made against the wishes of the plaintiff, in that it is the plaintiff's prerogative to pursue a claim against any defendants it sees fit.

[33] In this regard, I find the decision of the Supreme Court in the case *Tajjul Ariffin Mustafa v. Heng Cheng Hong* [1993] 3 CLJ 117 ("*Tajjul Ariffin*") instructive whereby the principals to be applied by the court in adding a defendant have been stated to include the following;

(i) all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and complete determination and adjudication to be made by the court of all questions and issues between the parties which arise for decision;

(ii) a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue; and

(iii) a person who is not a party to the action may be added as a defendant over the objections of the plaintiff. However, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter except in a proper case.

[34] In *Tajjul Ariffin*, the Supreme Court refused to allow the proposed intervener to be added as a defendant as it was held that the plaintiff cannot be forced to pursue a claim against the defendant whom he does not wish to proceed against:

> To sum up, therefore, we would answer the question posed at the outset of this judgment by saying that a plaintiff cannot be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made [*McCheane v. Gyles (ibid)*; *Horwell v. London General Omnibus Co*; *Re London Tramways Co* [1877] 2 Ex D 365; *White v. Carrara Ceiling Co (ibid)*] and so he should be allowed to proceed against the defendant of his choice - *Courtney v. Woods (ibid)*. There may be cogent reasons for his not wanting to proceed against the intended second defendant; for example, the intended second defendant, who is alleged by the defendant to have been wholly or partly at fault, may be a friend or next of kin of the plaintiff, or the joinder may result in unnecessary prolongation of the trial or in the plaintiff having to shoulder the burden of additional costs should he fail against both the defendants. There may, of course, be other reasons.

[35] Similarly, in the recent High Court case of *Chew Cheah Yin v. Tan Lee Lee; Real Expansion Sdn Bhd (Intervener)* [2020] 1 LNS 1108; [2020] MLJU 1418, Amarjeet Singh Serjit Singh JC refused to grant intervention on, among others, the ground that the plaintiff did not want to sue the proposed intervener and cannot be forced to do so:

> [23] It is my considered opinion, as a separate ground for dismissing this application, that this is not a proper case to add a non-party as a defendant. I arrived at this conclusion after applying the principles

enunciated in *Tajjul Ariffin*, (*supra*), as set out above. The proposed intervener is requiring that the plaintiff be forced to amend her statement of claim and pursue a remedy against it. The plaintiff clearly does not want to sue the proposed intervener. The remedy she is seeking can only be made against the defendant and no one else.

[24] The plaintiff's relief against the defendant is which of the two wills is the last will and testament of the deceased. **What then is the cause of action that the plaintiff is required to plead and the remedy it seeks against the proposed intervener in this case**? What if the facts pleaded and the remedy sought is not to the satisfaction of the proposed intervener? These are valid considerations according to *Tajjul Ariffin*, (*supra*), in exercising the discretion to refuse the order to intervene.

(emphasis added)

[36] In my view, applying the principles as enunciated above, I find the following:

(i) the SC should not be forced to add BPI as a defendant given that:

(a) SC is not seeking any relief or remedy against BPI in the main suit;

(b) the SC does not wish to sue BPI whereby the SC's investigations do not show that BPI has contravened any provisions or committed an offence under the CMSA; and

(c) the SC should be allowed to proceed against the defendants of its choice based on the evidence obtained from their investigations;

(ii) in my view, to force the SC to take action against BPI would be inconsistent with its performance of its statutory duties and I am certainly not prepared to step into the shoes of the SC and to decide who they should sue as defendants. This is especially so where the SC is not seeking any relief or remedies against BPI.

[37] In relation to O. 15 r. 6(2)(b)(i), on the evidence before me, I cannot conclude that BPI's presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon.

[38] As seen earlier, the primary dispute in the main suit is whether the defendants had contravened s. 179 of the CMSA. In my view, this matter can be effectively determined without BPI's presence.

[39] One of the reasons provided by BPI to support their application is their intent to show that they did not suffer any losses from the BPI's corporate exercises and that they intend/can produce reports, etc. However, I do not see the necessity for them to intervene for that purpose. In this regard, it is part of the defendants' defence in the main suit that BPI did not suffer any loss. As such, it is clearly open to the defendants to produce any member of management of BPI as a witness or to produce such reports to substantiate their contention that BPI did not make a loss.

[40] Further, it is the contention of the plaintiff that their claim in the main suit against the defendants is to recover pecuniary gains made by the defendants and such claim is not dependant on any proof of loss by BPI. In this regard, s. 200(2) of the CMSA provides as follows:

> **200. Civil action by Commission**
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> ...
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> (2) For a proceeding instituted by the Commission under subsection (1) against any person who has contravened section 175, 176, 177, 178, 179 or 181, the Commission may, if it considers that it is in the public interest to do so, by civil action against such person in contravention:
>
> (a) recover an amount which shall not exceed three times the gross amount of pecuniary gain made or loss avoided by such person; and
>
> (b) claim civil penalty in such amount as the court considers appropriate having regard to the severity or gravity of the contravention, being an amount not exceeding one million ringgit.

[41] Having considered all matters, I also find that O. 15 r. 6(2)(b)(ii) has not been satisfied by BPI whereby I am of the view that there are no questions or issues arising out of or relating to or connected with the relief or remedies sought by the SC between BPI and any party to the main suit to be determined by the court.

[42] In the main suit, the SC is seeking for reliefs *vis-a-vis* the defendants in their personal capacity premised on the defendants' alleged contravention of s. 179 of the CMSA. The SC is not seeking any relief or orders against BPI. Applying the test set out in *Pegang Mining* (as adopted by the Supreme Court in *Tohtonku*), BPI's rights against or liabilities to any party to the main suit in respect of the subject matter of the main suit would not be directly affected by any order which may be made in the main suit.

[43] In the Federal Court case of *Chong Fook Sin*, intervention was refused as the proposed interveners had failed to establish any legal interest in the subject matter of the appeal. That case concerned an appeal filed by Amanah Raya Bhd ("ARB") relating to the administration of the estate of the deceased and the ARB's compliance with an unless order made against ARB. The interveners sought to intervene in the appeal on the basis that they were beneficiaries of the estate. The Federal Court refused to grant intervention on the basis, among others, that any indirect interest could not amount to a legal interest to justify intervention.

[44] Similarly, in the Court of Appeal decision of *Dato' Dr Hj Mohamed Haniffa Hj Abdullah & Ors v. Koperasi Doktor Malaysia Bhd And Ors & Another Appeal* [2008] 3 CLJ 323; [2008] 3 MLJ 530, the court held that a non-party could not be made a necessary party if it would not be directly affected by any order that might be made by the High Court on the merits of the claim. In this case, Koperasi Doktor Malaysia Bhd ("KDMB") was not a necessary

party and as no claim had been made against it by the plaintiffs or any other existing party to the action, the claim failed as the High Court had no jurisdiction to permit KDMB to intervene and be added as a party to the suit.

[45] In so far as BPI's contention that they have a legal interest in the issues and relief sought by the SC as they concern issues of corporate governance and affairs of BPI for which they ought to have a right to be heard, I find no merit in such contention. In my view, this does not represent a legal interest in the subject matter of the suit. At best, it could be argued to be an indirect interest which is clearly not sufficient to justify intervention.

[46] In respect of a right to be heard, I am of the view that the same has no basis bearing in mind that the SC is not seeking any relief or order against BPI, whereby it is to be reiterated that the issue in the main suit is to be determined between the SC and the defendants ie, had there been a contravention of s. 179 of the CMSA by the defendants.

[47] BPI also contend that they ought to be allowed to intervene as the relief sought by SC would affect the BPI and its shareholders as any adverse findings made would affect its share price and create negative publicity. It is also contended that any adverse findings made in relation to their corporate exercises would also result in possible further action by other law enforcement bodies. I find these contentions to be purely speculative and unsubstantiated and cannot form the basis for an application to intervene.

[48] In relation to BPI's contention that they ought to be allowed to intervene as there is a possibility that they have a duty to recover the alleged losses in the event the defendants are found liable, I find no merit in the same. This is due to the fact that pursuant to s. 200(3) of the CMSA, any amounts recovered by the SC in the suit will be applied to compensate persons who have suffered loss or damage as a result of contravention. Section 200(3) reads as follows:

> (3) An amount recovered by the Commission in an action under subsection (2) shall be applied:
>
> (a) firstly, to reimburse the Commission for all costs of the investigation and proceedings in respect of the contravention; and
>
> (b) secondly, to compensate persons who have suffered loss or damage as a result of the contravention.

[49] BPI also rely on the decision of the Supreme Court in *Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19; [1991] 2 MLJ 27 (*"Arab Malaysian")* and contend that they have a pecuniary interest in the relief sought by the SC. However, with due respect, I do not see how and what manner such a pecuniary interest arises. In my view, even assuming the SC succeeds in disgorging the monies and there being a possibility of BPI receiving compensation under

s. 200(3)(b), this is not a basis for them to intervene as the fourth defendant. In the *Arab Malaysian* case, the facts were different in that the proposed intervener there was allowed to intervene on the basis that its pecuniary interest was directly affected by the main proceedings as the proposed intervener was exposed to liability and his pocket would be affected.

[50] In the upshot, in my considered view, BPI has failed to satisfy the requirements of O. 15 r. 6(2) of the ROC and I conclude that their presence is not necessary and that they have failed to show any direct legal interest in the subject matter of the main suit. On the contrary, in my opinion, it would be in the best interest of BPI as a public listed company to allow this court to examine at trial the conduct of the defendants and to make a determination on whether the SC has established its case against the defendants. As indicated earlier, if BPI for any reason are of the view that the defendants have not committed any contraventions of CMSA, the defendants are fully entitled to produce anybody from BPI to testify on their behalf. There is no necessity for them to be made a co-defendant.

[51] As such, BPI's application in encl. 107 to intervene as a fourth defendant is dismissed with costs of RM7,500 (subject to 4% allocator) to be paid by BPI to the plaintiff.